

# TABLE OF CONTENTS

<b>SECTION ONE: DIRECTORS AND OFFICERS</b>	2
DIRECTORS	2
OFFICERS	2
INVOLVEMENT IN BREACH	3
<b>SECTION TWO: BREACHES OF DIRECTOR'S DUTIES &amp; OTHER OFFENCES</b>	4
DUTY OF CARE AND DILIGENCE	4
INSOLVENT TRADING	7
DUTY OF GOOD FAITH AND PROPER PURPOSE	9
DUTIES AGAINST CONFLICTS OF INTEREST	11
DISCLOSURE OF MATERIAL PERSONAL INTEREST	14
RELATED PARTY TRANSACTIONS – **PUBLIC COMPANIES ONLY**	16
CONTINUOUS DISCLOSURE – **only ASX-listed companies**	18
INSIDER TRADING	19
CORPORATE FUNDRAISING	20
<b>SECTION THREE: REMEDIES</b>	25
MEMBER RIGHTS AND REMEDIES	25
CIVIL PENALTIES	31

## **SECTION ONE: DIRECTORS AND OFFICERS**

### **DIRECTORS**

#### **SECTION 9**

**director** of a company or other body means:

- (a) a person who:
  - (i) is appointed to the position of a director; or
  - (ii) is appointed to the position of an alternate director and is acting in that capacity; regardless of the name that is given to their position; and
- (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
  - (i) they act in the position of a director; or [**de facto director**]
  - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes. [**shadow director**]

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's **professional capacity**, or the person's **business relationship** with the directors or the company or body.

De facto directors [**acting in the position of a director**] – s 9(b)(i).

E.g. where director resigned but continued to negotiate agreements with the Commissioner and the Company's creditors – *DCT v Austin*

- Factors relevant to whether de facto:
  - Size the company – impacts discretion given to employees to deal with significant matters
  - How person is perceived to outsiders
  - Must be exercising top-level management functions

A person claiming to be a 'consultant' can be a de facto director – *Mistmorn Pty Ltd (in liq) v Yasseen*

A director or officer who uses their company to act as a consultant to another company can be held to be de facto director of the other company if it is established on the facts – *Grimaldi v Chameleon Mining*

Shadow directors [**instructing the other directors**] – s 9(b)(ii).

- A company can be shadow director – *Standard Chartered Bank of Australia v Antico*

Requirements from *Buzzle Operations v Apple Computer*:

- (a) Must be accustomed to act as *directors* in accordance with the shadow's instructions as to *how they should so act*.
- (b) Not a shadow director merely because you impose conditions on commercial dealings with the company.
- (c) Habitual, but free-willed, compliance with directors does not make a shadow director.

### **OFFICERS**

#### **SECTION 9**

**officer** of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or
- (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Officer includes:

- A secretary: s 9(a).
- A person:
  - Who makes decisions affecting the business of corporation: s 9(b)(i).
  - Who has the capacity to significantly affect the corporations financial standing: s 9(b)(ii).
  - Who gives instructions to the directors (apart from in professional capacity or business relationship): s 9(b)(iii).

Examples:

- Share trader with a \$10million trading limit not an officer – *ASIC v Citigroup*
  - Could have had the capacity to affect Citigroup's financial position, but ASIC failed to show that \$10million was a significant amount for Citigroup
- Secretary and general counsel found to be an officer notwithstanding which role he was acting in at the time of breaching s 180(1) duty – *Shafroon v ASIC*

## INVOLVEMENT IN BREACH

### Sect 79

A person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

## **SECTION TWO: BREACHES OF DIRECTOR'S DUTIES & OTHER OFFENCES**

### **DUTY OF CARE AND DILIGENCE**

#### **Section 180**

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
- (a) were a director or officer of a corporation in the corporation's circumstances; and
  - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

A director must exercise their powers and discharge their duties with a reasonable degree of care and diligence: s 180(1).

This duty arises under statute and at general law: s 185, *Daniels v Anderson*.

#### **(1) Standard of care and diligence** [objective but have regard to circumstances]

The standard of care and diligence is that of a reasonable person if they were a director or officer of a corporation in the corporation's circumstances and occupied the same office held by XX: s 180(1)(a)-(b).

- If a person acts as a reasonable person would act then they have not breached their duty, notwithstanding that other similar professionals might act differently: *ASIC v Vines*.

Minimum standard of diligence - *ASIC v Rich*:

- (1) to become familiar with the fundamentals of the business or businesses of the company;
- (2) to keep informed about the company's activities;
- (3) to monitor, generally, the company's affairs;
- (4) to maintain familiarity with the financial status of the company by appropriate means, including (in the case of a director) review of the company's financial statements and board papers, and to make further inquiries into matters revealed by those documents where it is appropriate to do so; and
- (5) in the case of a director, and at least some officers, to have a reasonably informed opinion of the company's financial capacity.

Relevance of expertise – *ASIC v Rich*:

- Failure to remain informed as to the company's financial position led to breach of s 180(1).
- Director's background, expertise (accountant) and appointment to finance and audit committee contributed to the standard of care that was expected of him.
- Non-executive directors cannot claim a lesser standard of care merely because they are non-executive

#### **(2) Actual care and diligence**

Compare actual level of care and diligence with against standard.

### **Defence - Business judgement**

#### **Section 180**

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
- (a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

XX may seek to rely on the business judgment rule, which acts as a defence, rather than a presumption in their favour – *ASIC v Rich*

### **(1) Business judgment**

A business judgment is any decision to take or not take action in respect of any matter relevant to the business operations of the corporation – s 180(3)

- A failure to consider a matter is not a business judgment – *ASIC v Adler*
- Business judgment cannot be used to knowingly break the law – *ASIC v Fortescue Metals*
- Includes actions taken in preparation of a business judgment: - *ASIC v Rich*
  - Planning, forecasting, budgeting etc.
  - Does not include: monitoring of financial reports.

### **(2) Elements**

Judgment must be: - s 180(2)

- (a) in good faith and proper purpose; and
- (b) no material interest in subject matter; and
- (c) informed of subject matter to extent reasonably believed to be appropriate; and
- (d) rationally believe judgment is in best interests of the corporation.
  - a. Rational unless: no reasonable person in their position would hold that belief.

### **(3) Conclusion**

Duties of care and diligence under s 180(1) and CL are discharged: s 180(2).

### **Defence – Delegation**

Directors can delegate their powers: s 198D (replaceable rule).

- Must supervise the delegate: *Daniels v Anderson*.
- The director is responsible for the actions of the delegate: s 190(1).

Not responsible for delegate under s 198D if: s 190(2).

- (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and
- (b) the director believed:
  - i. on reasonable grounds; and
  - ii. in good faith; and
  - iii. after making proper inquiry if the circumstances indicated the need for inquiry;